

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000690-001 DT

01/15/2009

COMMISSIONER EARTHA K. WASHINGTON

CLERK OF THE COURT
T. Melius
Deputy

D S S FINANCIAL GROUP LTD

DANIEL J SIEGEL

v.

DEBORAH WALROD (001)

FLOYD W BYBEE

REMAND DESK-LCA-CCC
SOUTH MOUNTAIN JUSTICE COURT

RECORD APPEAL RULE / REMAND

Lower Court Appeal No. CC200714554

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

The appellee/cross-appellant (hereinafter appellee), DSS Financial Group filed a complaint in the lower court against the appellant/cross-appellee (hereinafter appellant), Deborah Walrod on July 18, 2007. In April of 2007 the appellee had purchased an account from another company for a debt owed by the appellant arising from a credit card agreement. After the appellant refused to pay the debt owed, the appellee filed the complaint. In the complaint it alleged that the contract existed, and that the total amount owed by the plaintiff was \$8,460.25. The appellant representing herself filed an Answer to the complaint. In that pleading the appellant admitted that the lower court had jurisdiction over the case but alleged that the appellee was not entitled to judgment because the statute of limitations had expired on the debt.

The matter went to trial on February 28, 2008. At trial the appellee offered into evidence exhibits that showed that it had been assigned the account from Unifund CCR Partners on April

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10, 2007, and that the appellant owed the amount alleged in the complaint from the said account. Unifund had purchased the account from Chase Bank USA; the account had originated from First USA Bank. The managing member of the appellee's company, Steven Sandler, testified at the hearing. He told the court that the last charge incurred by the appellant was on May 6, 2004. The appellant told the court that she had defaulted on the account in April of 2004 after losing her job a couple of months before then.

Throughout the course of the trial the appellant argued against the admission of certain exhibits based on a hearsay objections. The lower court overruled the objections on all but one exhibit. During its closing argument the appellee stated that the appellant admitted to the debt not only at trial but also through her Answer to the complaint. By not denying the averments in the complaint the appellee argued that pursuant to Rule 8(d) of the Arizona Rules of Civil Procedure they were admitted. It argued that the claim against the appellant was not barred by the statute of limitation because it had "six years under contract to assert the claim," and thus was entitled to judgment in this case. In her closing the appellant argued two things. She first reasserted her hearsay objections which she claimed prohibited the appellee from introducing its exhibits into evidence. The appellant's second argument was that A.R.S. § 12-543 limited the appellee's ability to pursue the claim because the three year statute of limitations had passed. At the conclusion of the trial the lower court found in favor of the appellee and awarded judgment to it in the amount of \$5315.00.

The appellant has filed a timely notice of appeal. On appeal she argues that the trial court erred by admitting the appellee's exhibits over her hearsay and foundation objections. She further argues that the trial court erred by failing to find that the action was barred the statute of limitations pursuant to A.R.S. § 12-543. In its cross-appeal the appellee argues that the lower court erred in not awarding it the costs associated with the case as the winning party pursuant to A.R.S. § 12-341.

"We review the trial court's rulings on the admissibility of the evidence for abuse of discretion. *Roscoe*, 184 Ariz. at 491, 910 P.2d at 642 (citing *State v. Rivera*, 152 Ariz. 507, 515, 733 P.2d 1090, 1098 (1987))."¹ Assuming that the lower court did not abuse its discretion by allowing the appellee to introduce evidence pursuant to the business exception of Rule 803(6) of the Arizona Rules of Evidence, the viability of the claim in regard to the statute of limitations becomes the main issue in this appeal.

A.R.S. §12-543 governs the time limit to pursue a claim of unpaid debt on an open or stated account. The statute provides a three year statute of limitation on such actions. It states in part:

¹ *State v. Aguilar*, 209 Ariz. 40, 49, 97 P.3d 865, 874 (Ariz., 2004).
Docket Code 512

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There shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions:

2. Upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents, but no item of a stated or open account shall be barred so long as any item thereof has been incurred within three years immediately prior to the bringing of an action thereon.

The appellate court in *Cheatam v. Sahuaro Collection Service, Inc.* held that “[a] cause of action accrues whenever one person may sue another... [A] party’s failure to assert a cause of action does not mean that the cause of action has not accrued.”² In *Krumtum v. Burton*,³ the Arizona Supreme Court addressed the accrual of causes of actions and the statute of limitations in A.R.S. § 12-543 cases specifically. The *Krumtum* Court found that the services provided by the plaintiff to the defendants had been furnished on an open account.⁴ The Court defined an open account as “one where there are running or concurrent dealings between the parties, which are kept unclosed with the expectation of further transactions. * * * *Connor Livestock Co. v. Fisher*, 32 Ariz. 80, 85, 255 P. 996, 997 (1927).”⁵ The statute of limitations for an open account is three years.⁶ The statute of limitations begins to run on an open account from the date of the last item...⁷ The defendants in *Krumtum* had successfully plead the statute of limitations before the trial court in a motion for summary judgment. The plaintiff appealed the trial court’s finding. On review, the Supreme Court held that because the statute of limitations had run on the cause of action on the open account, the grant for summary judgment had been proper.⁸ (“[T]he last item charged on the open account was more than three years before the action was commenced and the statute of limitations having been pled is a bar to the suit.”)⁹

In this case, the credit card agreement between the appellant and First USA Bank, (which was subsequently assigned to the appellee) was an open account. The cause of action for the unpaid debt therefore accrued no later than May 6, 2004, after the last charge had been incurred by the appellant. The appellee had until May 6, 2007, at the latest to file a claim for the unpaid debt. The appellee filed its claim in July of 2007, three months after being assigned the account, but also two months past the statute of limitations deadline.

² 118 Ariz. 452, 454, 577 P.2d 738, 740 (App. 1978); see also *Healey v. Coury*, 162 Ariz. 349, 353, 783 P.2d 795, 799 (1989).

³ 118 Ariz. 448, 532 P.2d 510 (1975).

⁴ *Id.* at 451, 513 P.2d at 513.

⁵ *Id.* at 450, 577 P.2d at 512.

⁶ A.R.S. §12-543(2).

⁷ *Krumtum*, 118 Ariz. at 451, 577 P.2d at 513.

⁸ *Id.*

⁹ *Id.*

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Because the statute of limitations barred the claim for the unpaid debt, the lower court should have dismissed the case at the end of the trial.

IT IS THEREFORE ORDERED reversing the judgment of the lower court.

IT IS FURTHER ORDERED denying the appellee's request for cost in its cross-appeal. The matter shall be remanded to the South Mountain Justice Court for any further proceedings consistent with this opinion.

The appellant seeks costs and attorney's fees in connection with her litigation of the appeal and defending the action below. The appellant is instructed to proceed pursuant to Rules 12(d) and 13 of the Superior Court Rules of Appellate Procedure-Civil, if the rules are applicable to her. Any objection to the proposed costs and attorney's fees should be filed by the appellee within five days of the service of the statement by the appellant.